FILED
APR 15 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

JAMES LAWRENCE DOOLEY,
Appellant,
vs.
COMMONWEALTH OF VIRGINIA,
Appellee.

No. 911

Appeal from the Supreme Court of Appeals of Virginia

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT

The Opinions Below

The opinions of the courts below on the questions presented herein are: (1) *Commonwealth* v. *Dooley*, Circuit Court of Caroline County, Virginia, April 3, 1955, not reported, See Appendix A; (2) *Dooley* v. *Commonwealth*, 198 Va. 32, 92 S.E.2d 348 (1956), See Appendix B.

Jurisdiction

(i)

The proceeding below was a criminal action wherein the Defendant was convicted of speeding in violation of the Virginia Motor Vehicle Code and given a small fine.

The conviction was based entirely on evidence introduced under the terms of Title 46, Section 215.2(a), Virginia Code (Supp. 1954) (Acts of the Assembly 1954, Chapter 313, page 385).

(ii)

In an opinion dated April 23, 1956, the Supreme Court of Appeals of Virginia affirmed the conviction of the Defendant. A timely filed Petition for Rehearing was denied on June 19, 1956. A Notice of Appeal to this Court was filed in the Circuit Court of Caroline County, Virginia on September 17, 1956. The Circuit Court, then possessed of the record, extended, by various Orders, Defendant's time to docket this appeal until April 14, 1957.

(iii)

Jurisdiction of this appeal is granted to this Court by 28 U.S.C. 1257(2).

(iv)

The following cases are believed to be illustrative of this Court's jurisdiction to review criminal actions involving statutory presumptions and to determine whether they meet the constitutional standards of reasonableness and rebutableness with the meaning of the "due process" clause of the Fourteenth Amendment: *Manley* v. *Georgia*, 279 U.S. 1 (1929); *Hawes* v. *Georgia*, 258 U.S. 1 (1922); *Tot* v. *United States*, 319 U.S. 463 (1943).

Statute Involved

The validity of Title 46 Section 215.2 (a) Virginia Code (1954) is involved. (Acts of the Assembly 1954, Chapter 313, page 385).

> Checks on speed by use of electrical device; prima facie evidence of speed, arrest without warrant where signs show legal rate of speed.

(a) The speed of any motor vehicle may be checked by the use of radiomicro waves or other electrical device. The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceeding where the speed of the motor vehicle is at issue.

Questions Presented

The questions presented by this appeal are:

1. May a statutory presumption of the guilt of the accused be applied in a criminal proceeding wherein, by the very nature of the crime charged, the innocent defendant may take oath as to his belief in his innocence—but can do nothing more because he does not have access to any evidence which would have the slightest tendency to rebut the presumption and disprove his guilt?
2. In a criminal proceeding, may a statute create a presumption of guilt which arises upon the introduction of evidence emanating from a mechanical device, when, by the very nature of the device used, and the crime charged, an innocent defendant frequently has no access to any evidence which would tend to show whether or not he is innocent?
3. Does a statute ordering the acceptance, as prima facie evidence of the commission of a criminal act, of evidence emanating from any "radiomicro waves or other electrical device", have such breadth as to transgress the constitutional limitations on the legislative power to create statutory presumptions?

Statement of the Case

On the night of September 6, 1954, a police officer overtook and apprehended the Defendant as he was driving along U. S. Route 1; charged him with operating his vehicle at a speed of 62 miles per hour in a 55 mile per hour zone; and placed him under arrest.

The Defendant protested that he had been carefully watching his speedometer; that he believed it to be accurate; and that he had never observed any such reading. The officer then admitted that he had been following the Defendant for "a couple of miles" and that he had never observed any violation of law, but asserted that the Defendant had previously passed a radar speed-meter which had given an indication of 62 miles per hour.

The above facts were evidenced in a traffic court (not of record) and this testimony was stipulated [1] at a trial *de novo* in the Circuit Court of Caroline County, Virginia, together with the further stipulation that the Defendant had a reputation for truth and veracity under oath.

The radar evidence was admitted solely under the provisions of § 46-215.2(a), which orders the courts to accept such evidence as prima facie evidence of the speed of the automobile of the accused.

After reviewing the stipulations, the Circuit Court invited the Defendant to testify as to the reading of his automobile's speedometer at the instant he had passed within the range of the radar device. The Defendant was unable to take such an oath, as the radar apparatus had been used in the usual manner, i.e., artfully hidden from the view of passing motorists, and he had not even known of its existence until the time of his arrest, which occurred miles away from the situs of the radar check.

In a written opinion on the law and the facts, the Circuit Court concluded by holding that:

> " . . . the accused having failed to rebut the presumption created by the statute by being unable to testify what his speedometer was registering at the

[1] Opinion of the Circuit Court, Appendix A, *infra*, pp. 14-15 (all stipulations reported).

time the radar was measuring his speed . . . will be convicted of . . . 62 miles per hour."[2]

At the trial in the Circuit Court, the Defendant had orally objected to the consideration of the radar evidence, admitted only under the terms of § 46-215.2(a), on the grounds that the statute is violative of the Fourteenth Amendment in that it *compels* the court to consider the readings of the radar device as *prima facie* evidence of the *corpus delecti*, i.e., the speed of the motor vehicle, and hence of the guilt of the accused.

He did not then (and does not now) question the *admissibility* of radar evidence but merely asserted that a statute compelling the admission of such evidence as *prima facie* evidence of the ultimate fact of guilt is improper because an innocent defendant ordinarily has no access to any evidence which is capable of serving to rebut the presumption.

He also urged that the statute was of unreasonable and unconstitutional breadth in that it presumed the guilt of the accused on the basis of evidence emanating from any and all electrical devices, including, apparently, even home-made or jerry-built devices.

After considering the Defendant's brief on the constitutional issues, the Circuit Court issued its written opinion[3] holding that the statute was valid. The Defendant petitioned the Supreme Court of Appeals of Virginia for a Writ of Error, asserting, *inter alia*, that the statute was unconstitutional. A Writ was granted, and plenary consideration was given to this question.

While the question of breadth of the statute was in issue on appeal, both sides devoted most of their argu-

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[2] Opinion of the Circuit Court, Appendix A, *infra*., p. 21.

[3] Opinion of the Circuit Court, Appendix A, *infra*., p. 14.

ments to the question of whether the presumption is fairly rebutable by an innocent defendant.

The Commonwealth did not consider itself bound by the Circuit Court's indication that the presumption can *only* be rebutted by the accused's oath as to his speed at the unknown instant he had passed an unseen radar device, but rather noted that the Defendant had not introduced any evidence tending to establish that the particular device used was *capable of error* and argued that the Defendant had had, but missed, this opportunity to rebut the presumption.

The Defendant countered by pointing out that the second "opportunity" was but a mirage. Evidence showing that the device is capable of error would have been irrelevant to the ultimate question of guilt, as a statutory presumption is not rebutted by the introduction of evidence tending to show that the statute should never have been enacted—rather, only by the presentation of evidence *proving* that the presumed fact is not a fact at all.

Therefore, Defendant argued, while proving conclusively that the device used is *capable of error*, say, 5% of the time, (which he had neglected to do) might reflect on the wisdom of the Legislature, *it would not prove that the accused was not speeding*—it would not disprove the presumed fact.

The point falls into focus when one considers that the famous common law presumption that "possessors of recently stolen goods are thieves" is not rebutted by proving that 5% of the people possessing such goods are honest—it is only disproved by *proving that the accused did not steal the goods.*

With this in mind, the Defendant continued to assert that he had, by the very nature of the case, no access to any proof that he was not speeding at the instant he

had passed the hidden radar machine (miles away from the situs of his arrest and first notification of existence of the machine), and that though the presumption was nominally *prima facie*, it was, as a practical matter, irrebutable and conclusive, and hence indisputably unconstitutional. He urged that the statute thus made his constitutionally-guaranteed trial an idle ceremony—the real trial having occurred a year previous in the halls of the Legislature.

Despite Defendant's assertions, the Supreme Court of Appeals of Virginia held that the statute was valid and that Defendant's arguments[4] showed "beyond peradventure" that:

> " . . . he could have introduced evidence to rebut the presumption . . ."[5]

but it did not elaborate or explain how this could have been done. This opinion did not mention the question of the breadth of the statute, although this point was fully

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[4] The Court of Appeals was undoubtedly referring to the authorities cited by the Defendant at oral argument to show that while the proponents and opponents of the admission of radar speedmeter evidence are in violent disagreement concerning the likelihood of the device giving an improper reading because of some *intrinsic* or internal malfunction, [Compare: Kopper, *The Scientific Reliability of Radar Speedmeters*, 33 N.C.L. Rev. 343 (1955); with Carosell and Coombs, *Radar Evidence in the Court*, 32 DICTA 232 (1955)] they agree that the device is capable of momentary and unduplicatable error due to the presence in the area of certain *extrinsic factors*. One of these authorities lists such factors as lightning, birds, nearby electrical devices (including those on passing vehicles), noise, and radio interferences. These were cited by the Defendant in an argument attempting to show that he had no access to proof of *which* of these, or other, extrinsic factors *may* have caused a normally accurate radar device to err because of their temporary and unduplicatable presence in the area.

[5] Opinion of the Supreme Court of Appeals of Virginia, Appendix B, *infra*., P. 25.

briefed and argued,[6] but rather merely held that the statute was "in all respects a valid enactment".[7]

The Federal Question Presented Is Substantial

The Federal question presented herein is substantial in that a decision of this court is needed for the guidance of the respective legislatures and courts charged with the creation and application of laws dealing with the administration of justice in criminal proceedings.

The statute challenged is mainly applicable to certain criminal proceedings and creates a prima facie presumption of the existence of the ultimate fact upon which guilt is predicated.

Within the past few decades there has been an unprecedented volume of legislative enactments incorporating artificial presumptions designed to facilitate proof by prosecutors in criminal cases. This trend has been the subject of widely divergent comment—some have viewed it with equanimity, the comments of Wigmore being typical:

> "There is not the least doubt, on principal that the Legislature has entire control over such rules (presumptions) as it has over other rules of procedure in general and evidence in particular—subject only to the limitation on the rules of evidence expressly enshrined in the constitution."[8]

Others have viewed the entire trend as fraught with danger to the judicial system, perhaps the most articulate

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[6] There is no question of the statute's "or other electrical device" falling under the rule of *ejusdem generis*, as the Commonwealth admitted in its brief below that electrical speed determining devices, other than radiomicro wave devices, are used in Virginia, and these presumably fall within the broad wording of the statute.

[7] *Ibid.*, footnote 5, P. 26.

[8] Wigmore, Evidence (1925) § 1356.

warning being voiced in a dissenting opinion by Mr. Justice McReynolds in *Casey* v. *United States*, 276 U.S. 413 (1928):

> "Once the thrumbscrew and the following confession made conviction easy; but that method was crude and, I suppose, now would be declared unlawful upon some ground. Hereafter, presumption is to lighten the burden of the prosecutor. The victim will be spared the trouble of confessing and will go to his cell without mutilation or disquieting outcry." (at 420)

It was 1910 before this Court had occasion to enunciate any constitutional limitations on the power of legislatures to enact artificial presumptions when it held that such a presumption must be reasonable and "must not, under the guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed". *Mobile, J. & K. C.R.R. Co.* v. *Turnipseed*, 219 U.S. 35, 43 (1910).

Since the *Turnipseed* case, this Court has continued to assert that artificial or statutory presumptions must be both reasonable, and, perhaps more important, rebuttable.[9] But while the rule is easy to recite, the lower courts have encountered considerable difficulty in applying it with any degree of uniformity.[10]

It is therefore submitted that this Court's previous holding of jurisdiction over such cases, when it stated that:

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[9] *See: Hawes* v. *Georgia*, 258 U.S. 1 (1922); *Yee Hem* v. *United States*, 268 U.S. 178 (1925); *Manley* v. *Georgia*, 279 U.S. 1 (1929); *Tot* v. *United States*, 319 U.S. 463 (1943).

[10] *Compare: Benton* v. *United States*, 232 F2d 341 (C.A.D.C. 1956) ("burglar tool" statutory presumption invalid), with *Burnette* v. *Commonwealth*, 194 Va. 785 (1953) (similar statute valid); *State* v. *Kelly*, 217 Minn. 247 (1944) (invalidating statutory presumption that possession of liquor means possessor is a bootlegger) with *Miller* v. *Commonwealth*, 172 Va. 629 (1939) (similar statute valid).

> " . . . the due process clauses of the . . . Fourteenth Amendment set limits upon the power of . . . a state legislature to make proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated." *Tot* v. *United States*, 319 U.S. 463, 467 (1943)

should be applied in the instant case and that this Court should now give the legislatures and the lower courts further instructions on the application of the "reasonable and rebuttable" standard.

Since the present statute represents something of an extension of the application of statutory presumptions, in that the presumption does not arise upon proof of some suspicious conduct [11] of the accused, but rather upon the proof of the silent reading of a hidden mechanical device at a time and place unknown to him, there is a need for a specific ruling which will either clearly affirm this extension, and encourage the enactment and upholding of similar statutes, or, on the other hand, arrest the trend towards an era of push button justice in the traffic courts.

This is not to say that this Court should attempt to pre-evaluate whatever new mechanical evidence-emanating devices that may be developed, but *it should now announce* the controlling standards, particularly as to rebuttableness, which are to be considered in enacting and applying *statutory* presumptions based upon such evidence.

The questions presented by this appeal are in no way concerned with whether radar speedmeters are frequently inaccurate, as asserted by their opponents, or infrequently

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[11] Excluding the controverted radar evidence, there was no evidence tending to create any grounds for suspicion of the accused—rather an officer trailed him for "a couple of miles" without observing any violation of the law. Moreover, the record shows that the Defendant, who has a reputation for truth and veracity under oath, frequently observed his speedometer and has no reason to believe himself guilty.

inaccurate, as asserted by their proponents.[12] The relative frequency of error of these devices is immaterial to the question of the propriety of according a statutory prima facie weight to their results in proceedings wherein, by the very nature of the crime charged, and presumed by the statute,[13] the innocent accused has no access to any evidence which would positively rebut the presumption, and, indeed, does not even have access to any evidence which would have a tendency to disprove his guilt.

The questions presented are only incidently concerned with either radar speedmeters or the crime of speeding. They only rise to the stature of "substantial federal questions" because they are concerned with the preservation of the constitutional limitations on the power of legislatures to create presumptions—with the preservation of the requirement that any statutory presumption be reasonably rebuttable by an innocent defendant.

Now there is no escaping the fact that the present appeal merely involves a traffic ticket and a relatively light fine, and the Commonwealth will undoubtedly argue that this Court should refuse to give plenary consideration to such minor matters. However, it is now submitted this reasoning should be summarily rejected.

The requirement that a federal question cognizable by this Court should be substantial must not be interpreted to mean that this Court only has jurisdiction over criminal cases involving major crimes—*for the concept of due process of laws is not the private sanctuary of felons and traitors, but also serves to protect that vast majority of our citizenry whose only contact with criminal law is in the traffic courts.*

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[12] See Note 4, *supra*.

[13] No valid distinction can be drawn between presuming that a defendant is driving 62 m.p.h. in a 55 m.p.h. zone and presuming that he is guilty of speeding.

Moreover, as recently pointed out by the New York Supreme Court of Appeals (in outlawing a presumption that the registered owner of a motor vehicle was driving it at the time an unlawful speed was recorded by a mechanical device),[14] speeding is not only a misdemeanor, but also can be an element of the crime of manslaughter, and the statute here attacked would be applicable. Further, speeding *per se* is not the minor crime of yesteryear, as long jail sentences, heavy fines, and the withdrawal of the driving privilege are no longer considered unusual penalties.

It must also be remembered that the Commonwealth is hardly in a position to fairly term the matter as minor. Over 30,000[15] persons were convicted under this statute in Virginia in 1955. Conservatively assuming an average fine of $15.00, the total penalties garnered under the statute in one year amount to over one half million dollars.[16]

CONCLUSION

It is unlikely that the questions presented by this appeal will again be brought before this forum. The average innocent defendant, however wronged he may feel, has neither the knowledge of the necessity of raising the constitutional question in the court of first instance, or the predisposition and financial resources to maintain an appeal to this Court. The constitutional question is

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[14] *People* v. *Hildebrandt*, 308 N.Y. 397, 126 N.E. 2d 377, 49 A.L.R. 2d 449 (1956).

[15] *Evening Star*, Washington, D. C., July 9, 1956, p. A-24.

[16] Of course, most of these people were undoubtedly guilty, and in such cases the statute merely expedited a deserved conviction. But that minority, albeit small, which happened to be innocent, were treated with broad equality by the statute—their conviction was also assured.

closed in Virginia,[17] and other states will undoubtedly follow this precedent in considering similar statutes.[18]

It is therefore respectfully submitted that statutory presumptions of guilt, based upon evidence emanating from a wide variety of mechanical devices, will soon become an integral part of our traffic laws unless this appeal is heard and determined.

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[17] See: *Royals* v. *Commonwealth*, —— Va. ——, (March 11, 1957, Virginia Supreme Court of Appeals).

[18] Nebraska has enacted a similar statute, *Neb. Rev. Stat.* §§ 39.7, 108.02 (Supp. 1955).

APPENDIX A

OPINION OF THE CIRCUIT COURT OF CAROLINE COUNTY

• • • •

This is an appeal from the Trial Justice Court which has been submitted to the Court on an agreed statement of facts, which is as follows:

"1. At approximately 9:50 P. M. on Monday September 6, 1954 defendant was operating a motor vehicle on U. S. Highway No. 1 in Caroline County, Virginia; a Virginia State Trooper then and there operated a radar speed-determining device, in the manner normally used to measure the speed of a motor vehicle, and this device, indicated that defendant's motor vehicle was travelling at a rate of speed of 62 miles per hour; the lawful rate of speed in the area within the scope of the radar speed-determining device was, at that time, 55 miles per hour.

"2. The above mentioned radar speed-determining device was tested on the evening of September 6, 1954, prior to the above mentioned operation thereof, and was found to be working properly.

"3. After the above mentioned operation of the radar speed-determining device, the above mentioned State Trooper followed the defendant 'a couple of miles' before stopping him to make the arrest; during this period the State Trooper did not observe or attempt to observe any violation of the speed, or other, laws by the defendant.

"4. U. S. Highway No. 1 is properly provided with radar warning signs and is properly posted with speed limit signs of the type specified in Title 46, Section 215.2 of the Virginia Code.

"5. In the Trial Justice Court of Caroline County on September 17, 1954, defendant testified that his speed-

ometer was believed to be working properly on the night of September 6, 1954; and testified further that he did not at any time in Caroline County on September 6, 1954 observe a speedometer reading of 62 miles per hour or in excess thereof; and testified further that he the defendant frequently observed the reading of his speedometer on September 6, 1954.

"6. Defendant has a reputation for truth and veracity under oath.

"7. Defendant was convicted in the Trial Justice Court of Caroline County on operating motor vehicle at an excess rate of speed, to-wit 62 miles per hour, in a 55 mile per hour zone; said Court is not a court of record; said conviction was based entirely upon evidence introduced and accepted under the provisions of Title 46-215.2 of the Virginia Code."

From the above statement of facts the Court is of the opinion that the defendant did operate his automobile in violation of the law if the result of the radar test is accepted.

It is contended, however, that Code Section 46-215.2 of the Code violates the Fourteenth Amendment to the Constitution of the United States, and, therefore, the result of such test cannot be received in evidence.

The part of the above section under attack here reads as follows: "The speed of any motor vehicle may be checked by the use of radio-micro waves or other electrical device. The results of checks *shall* be accepted as *prima facie* evidence of the speed of such motor vehicle in any court of legal proceedings where the speed of the motor vehicle is at issue." (Italics supplied).

The first section of Amendment XIV to the Constitution of the United States reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Prima facie presumptions have been employed in the Criminal laws of this Commonwealth for many years. The Virginia prohibition laws of 1918 and 1928 contained many sections providing that the establishment of one fact should be *prima facie* evidence of guilt. Thus 4675 (20) of the Code of 1926 provided that "all persons found at a distillery where ardent spirits are being manufactured *shall* be deemed *prima facie* guilty of manufacturing the *same* or aiding or abetting in such manufacture • • •"

In *Zimmerman* v. *Commonwealth*, 148 Va. 745, 748, 138 S. E. 569 (1927) the Court said: "Under this section the presence of the accused at the still where the distilled ardent spirits were being manufactured, alone makes out a *prima facie* case of guilt of manufacturing distilled ardent spirits against the accused. *This presumption may be rebutted*, but the question as to whether it has been rebutted is usually one for the jury, especially where there is other incriminating evidence." (Italics supplied).

See also *Johnson* v. *Commonwealth*, 142 Va. 639, 128 S. E. 456 (1925) *Kilgoe* v. *Commonwealth*, 139 Va. 581, 123 S. E. 534 (1924) and *Spencer* v. *Commonwealth*, 136 Va. 687, 689, 116 S. E. 235 (1923).

Even in the absence of a statute it has long been held that the introduction of certain evidence in criminal cases raises a *prima facie* presumption which requires rebuttal evidence by the accused. Thus in *Hanger* v. *U. S.* 285

U. S. 427, 52 S. Ct. 417, 76 L. (ed.) 861 (1932) a prosecution for using the mails to defraud, the Court said (52 S. Ct. 419): "The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed. *Rosenthal* v. *Walker*, 111 U. S. 185, 193, 4 S. Ct. 382, 28 L.(ed.) 395. And the fact that receipt of the letter subjects the person sending it to a penalty does not alter the rule. *Id.*, p. 194 of 111 U. S. 4 S. Ct. 38, 28 L. (ed.) 395. If the indictment had alleged actual delivery of the letter in question the case for the government in this particular would have been made out by proof that the letter thus directed had been placed in the post office for transmission. *The burden then would have been cast upon petitioners to show the contrary.*" (Italics supplied).

In *ex parte Converse*, 137 U. S. 624, 632, 34 L. (ed.) 796, 799 (1891) Mr. Chief Justice Fuller speaking for the Court said: "We repeat as has so often been said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the Courts of a State in administering the process provided by the law of the State * * *".

One of the leading cases on this subject is *People* v. *Cannon*, 139 N.Y. 32, 36 A. S. R. 668 (1893). In that case the Legislature of New York enacted a statute which made it unlawful for a junk dealer or dealer in second hand articles to have in his possession certain kinds of trade-marked bottles without the written consent of the

owner of the trade mark, and it further provided that such possession should *prima facie* presumed to be in the unlawful use, purchase or traffic in such bottles. The validity of this statute, as is the statute involved here, was assailed as violating the due process clause of the Constitution.

The Court held, however, that the act was not in violation of the Constitution, as notwithstanding the presumption created by the statute the jury should refuse to convict unless satisfied from the whole evidence, beyond a reasonable doubt, that the accused was guilty. It further held that a statute may make the existence of certain facts *prima facie* evidence of the commission of a crime, though the explanation of the facts from which the presumption arises is not peculiarly within the knowledge of the person accused.

In so holding the Court said (36 A. S. R. 679): "The effect of the presumption is to call upon the accused for some explanation. If more be given, the jury may, as I have said, still refuse to convict, but, if they convict, the verdict may be upheld as founded upon sufficient evidence. The provision fills all the requirements of an act of this nature, for it leaves an accused a fair opportunity to relieve himself from the presumption, to explain the circumstances under which the bottles came into his possession, and that they were of such nature as to show him innocent of an unlawful use, purchase or traffic therein."

Of course it is conceded that a statute which created a conclusive presumption of guilt would be unconstitutional.

But so far as the Court has been able to find it has been a common practice for State laws to declare proof of certain acts or facts *prima facie* evidence of guilt and the cases have uniformly upheld these statutes. See the review of these authorities in *People* v. *Cannon, supra.*

In *Yee Hem* v. *United States*, 268 U. S. 178, 183, 45 S. Ct. 470, 69 L. ed. 904 (1925) the Court quoted from the opinion in *Mobile J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43, 55 L. (ed.) 78, 80, 81, 31 S. Ct. 136, 32 L. R. A. (U. S.) 226, Ann Cas. 1912-A 463, 2 N. C. C. A. 243 as follows: "The law of evidence is full of presumptions either of fact or of law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded • • •

"Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous.

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"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must under the guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

In *Burnett* v. *Commonwealth*, 194 Va. 785, 790, 75 S. E. (2nd) 482 (1953) Mr. Chief Justice Hudgins speaking for the Court said: "The general rule approved by various decisions and legal articles is that the test of constitutionality of such statutes making proof of a certain fact *prima facie* or presumptive evidence of another fact, is whether there is a natural and rational evidentiary re-

lation between the fact proven and the ultimate fact presumed, and that the inference of one fact from proof of another must not be so unreasonable as to be purely arbitrary. To state the rule in positive terms, in order for such a statute to be valid, there must be some rational connection between the fact proved and the ultimate fact to be established."

Speaking of the *prima facie* presumption created by Code Section 18-159 the Chief Justice said: "• • • All the statute does is to create a presumption of a criminal intent from proof of possession of burglarious tools or implements. Such a presumption is not conclusive; it cuts off no defense. It interposes no obstacles to a contest of all the issues of fact, and relieves neither the Court nor the jury of the duty to determine all of the questions of fact from the weight of the whole evidence. 'It is merely a rule of evidence and not the determination of a fact.' *Barton* v. *Camden*, 147 Va. 263, 272, 137 S. E. 465. When possession is proven, the burden of going forward with the evidence shifts to the defendant, but this does not shift, the burden of ultimate proof, or deprive the defendant of his right to have the jury instructed on the presumption of innocence."

It is a well known fact that the excessive use of speed on the highways has resulted in death to thousands of persons every year and the loss of millions of dollars worth of property. The speed laws of Virginia before the advent of radar were more honored in the breach than the observance by a large percentage of those driving motor vehicles on the highways. The State Police force is entirely too small to adequately police all of the highways of this Commonwealth and even with radar the death toll although somewhat reduced continues to mount.

There is no difference in principle between the catching of speeders with radar and the established system of

catching them by trailing them in a car with a properly calibrated speedometer.

All that the statute does is to create a *prima facie* presumption that the speed of a vehicle was that registered by the radar machine. This does not dispense with the necessity for the Commonwealth to prove that the machine was in working order at the time the test was made nor does it dispense with the presumption of innocence or present the accused from interposing any one or more of a number of defenses to rebut this *prima facie* presumption. The presumption here is not conclusive; "it cuts off no defense. It interposes no obstacle to a contest of all the issues of fact, and relieves neither the Court nor the jury of the duty to determine all of the questions of fact from the weight of the whole evidence." *Burnett* v. *Commonwealth, supra.*

For the foregoing reasons it is held that Code Section 46-215.2 (Acts 1954 c. 313) does not violate the Fourteenth Amendment, and is a valid enactment.

The parties having stipulated that the radar device was tested on the evening of 6 September, 1954, prior to its use in measuring the speed of the vehicle operated by the accused, and was found to be working properly and that it registered the speed of accused's vehicle at 62 miles per hour and the accused having failed to rebut the *prima facie* presumption created by the statute by being unable to testify what his speedometer was registering at the time the radar measured his speed, the accused will be convicted of operating his motor at a speed of 62 miles per hour and the same fine imposed by the trial justice will be imposed.

April 13, 1955.

LEON M. BAZILE, Judge.

APPENDIX B

OPINION OF THE SUPREME COURT OF APPEALS OF VIRGINIA

Dooley was convicted of operating a motor vehicle at a speed of 62 miles per hour in a 55-mile zone. Radar equipment was employed in determining the speed of the car.

Defendant's assignments of error are: (1) That the trial court erred in holding that radar warning signs had been posted in accordance with subsection (c) of § 46-215.2 of the Code (1954 Cum. Supp., pp. 83, 84); and (2) That the court erred in holding that § 46-215.2 did not violate the Fourteenth Amendment to the Constitution of the United States.

The facts as stipulated in the trial court are contained in the record before us and are substantially as follows:

The defendant was operating a motor vehicle on a primary highway in Carolina County at about 10:00 p.m. on September 6, 1954. A radar speed-determining device operated by a Virginia State trooper in the manner normally used to measure the speed of a motor vehicle indicated that defendant's automobile was traveling at a speed of 62 miles per hour in a 55-mile-per-hour zone. The radar equipment had been tested on the evening of the arrest and was found to be working properly. After the State trooper had checked the speed of the defendant's car he followed defendant for two miles before making the arrest, during which time he did not attempt to observe any violation of the speed or other laws by defendant.

The highway on which defendant was traveling was properly provided with radar warning signs and speed limit signs of the type specified in § 46-215.2 of the Code.

The defendant, who had a good reputation for truth and veracity, testified that his speedometer was believed to be working properly on the night in question. He further testified that he did not, at any time while he was operating his motor vehicle, observe his speedometer reading 62 miles per hour or in excess thereof, and that he had frequently observed its reading at the approximate time in question.

All available evidence is contained in the stipulation, and we are thus limited in the factual consideration of the case.

Subsection (c) of § 46-215.2 provides:

"(c) No operator of a motor vehicle may be arrested under this section unless signs have been placed at the State line on the primary highway system • • •."

It will be observed that the stipulation concedes that the highway on which defendant was traveling "was properly provided with radar warning signs • • • of the type specified in § 46-215.2 of the Code". Therefore, assignment (1) is without merit.

Defendant contends in assignment (2) that Code, § 46-215.2 violates the Fourteenth Amendment to the Constitution of the United States, and that the result of such checks as are provided by statute should not be received in evidence against him. Subsection (a) here under attack provides:

"(a) The speed of any motor vehicle may be checked by the use of radiomicro waves or other electrical device. The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue."

Defendant's contention that the Act contravenes the due process clause of the Constitution is, in our view, with-

out merit. The general rule is that the test of the constitutionality of statutes making proof of a certain fact *prima facie* or presumptive evidence of another fact is whether there is a natural and rational evidentiary relation between the fact proven and the fact presumed. Where such evidentiary relation exists and where the presumption is found to be both reasonable and rebuttable it does not violate the due process amendment. *People* v. *Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759; *Burnette* v. *Commonwealth*, 194 Va. 785, 790, 75 S. E. 2d 482, 485; *Yee Hem* v. *United States*, 268 U. S. 178, 45 S. Ct. 470, 69 L. ed. 904; *Tot* v. *United States*, 319 U. S. 463, 63 S. Ct. 1241, 87 L. ed. 1519. See Annotation, 162 A. L. R., p. 495, *et seq.*

Analagous to many statutory presumptions there are certain rules of evidence carried over from the common law making proof of one fact *prima facie* evidence of another One such rule is that the exclusive possession of goods recently stolen is *prima facie* evidence of guilt, throwing upon the accused the burden of accounting for that possession. *Miller* v. *Commonwealth*, 185 Va. 17, 21, 37 S. E. 2d 864, 866. And a mortal wound inflicted with a deadly weapon in the previous possession of the slayer without any or upon slight provocation is *prima facie* evidence of a wilful, deliberate and premeditated killing, and throws upon the accused the necessity of showing extenuating circumstances. Such rules of evidence have been found to be neither unfair nor illogical in a long series of criminal trials. *Thomas* v. *Commonwealth*, 186 Va. 131, 137, 138, 41 S. E. 2d 476, 479; *Bailey* v. *Commonwealth*, 193 Va. 814, 829, 71 S. E. 2d 368, 375, 376.

That there is a natural and rational evidentiary relation existing between the results of a speed check by radiomicro waves and the speed of the motor vehicle checked by them can hardly be denied. For many years the public has become generally aware of the widespread

use of radiomicro waves or other electrical devices in detecting the speed of motor vehicles or other moving objects; and while the intricacies of such devices may not be fully understood their general accuracy and effectiveness are not seriously questioned. *State* v. *Dantonio*, 18 N. J. 570, 115 A. 2d 35, 39, 40.

In the instant case the only evidence introduced by the defendant tending to refute excessive speed was the purely negative statement that " • • • he did not at any time • • • observe a speedometer reading of 62 miles per hour • • •". Realizing the probative weakness of this statement defendant contents himself by citing technical data in argument which tends to cast doubt upon the accuracy of radar devices. He recounts many conditions and happenings which allegedly affect the correct reading of radar under given circumstances, and argues that in this light the *prima facie* presumption created by the statute is irrebuttable.

As heretofore stated, the factual consideration of this case is confined to the stipulation. It will be observed that no attempt was made to show that the radar equipment, which had been tested for accuracy just prior to the defendant's arrest, did not properly record the speed. The examples cited by the defendant in his argument in an effort to show that the equipment might have been "thrown off" and may have improperly recorded his speed, show beyond peradventure that if such occurred he could have introduced evidence to rebut the *prima facie* presumption created by the statute.

Neither does the statute, as contended by the defendant, shift the burden of proof. It merely creates a rule of evidence and does not determine the guilt of the accused. When the radiomicro wave check of the speed of a motor vehicle is proved to be in excess of the legal rate of speed the burden of going forward with the evidence shifts to the defendant. This neither shifts the

burden of ultimate proof nor does it deprive the defendant of the presumption of innocence. *Barton* v. *Camden*, 147 Va. 263, 272, 273, 137 S. E. 465.

For the reasons stated, we hold that § 46-215.2 (Acts of Assembly 1954, Chapter 313, page 385) does not violate the Fourteenth Amendment to the Constitution of the United States, and that it is in all respects a valid enactment.

Affirmed.

APPENDIX C

ORDER OF THE CIRCUIT COURT OF CAROLINE COUNTY

This day came the Attorney for the Commonwealth and the accused appeared in Court in answer to his recognizance and being represented by counsel, and having pleaded not guilty to the charges in the warrant and waived trial by jury on the 11th day of October, 1954, and the Court on this day after listening to the evidence and the argument of counsel having directed that the Attorney for the Commonwealth and the Attorney for the accused file briefs on the law on the charges in this case within thirty days of the 11th day of October, 1954. Said briefs were filed as directed by the Court and the Court having carefully examined same filed a written opinion in this case. In said opinion the Court held that the accused was guilty as charged in the warrant and that the same fine be imposed that was imposed in the Trial Justice Court. Therefore it is ordered and decreed by this Court that the said James Lawrence Dooley is guilty of operating a motor vehicle at a speed of sixty-two (62) miles per hour in a fifty-five (55) mile per hour zone, on the 6th day of September, 1954 in Caroline County, Virginia and that the said James Lawrence Dooley is fined ten dollars ($10.00) and that he pay the cost in these proceedings.

Enter May 12, 1955.

LEON M. BAZILE, Judge.

Office - Supreme Court, U.S.
FILED
MAY 16 1957
JOHN T. FEY, Clerk

In the

Supreme Court of the United States

October Term, 1956

No. 911

JAMES LAWRENCE DOOLEY
Appellant

v.

COMMONWEALTH OF VIRGINIA
Appellee

Appeal from the Supreme Court of Appeals of Virginia

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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Supreme Court Building
Richmond, Virginia

May 14, 1957.

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In the

Supreme Court of the United States

October Term, 1956

No. 911

JAMES LAWRENCE DOOLEY

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

Appeal from the Supreme Court of Appeals of Virginia

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Appellee, believing that the matters set forth herein will demonstrate the lack of jurisdiction of this court and, further, the lack of substance in the questions presented by this appeal, files this Statement in opposition to the Appellant's statement as to jurisdiction. The Appellee includes herein its motion to dismiss the appeal on the ground that the appeal has not been timely docketed in conformity with Rule 13 of this Honorable Court, and, in the alternative, to dismiss the appeal or affirm the order of the court below on the ground that the federal questions raised on behalf of the Appellant are so unsubstantial as not to need further argument. The matters here relied upon are more particularly stated below.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A.

The Statute

The Appellant contends that Section 46-215.2(a) of the Code of Virginia (Chapter 313, Acts of Assembly, 1954), is repugnant to the Constitution of the United States. That section of the Code of Virginia reads as follows:

> "The speed of any motor vehicle may be checked by the use of radiomicro waves or other electrical device. The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court proceedings where the speed of the motor vehicle is in issue."

B.

Statement of the Case and the Proceedings Below

1. At approximately 9:50 p.m., on Monday, September 6, 1954, the Appellant was operating a motor vehicle on U. S. Highway No. 1 in Caroline County, Virginia. A radar speed determining device, operated by a Virginia State Trooper in the manner normally used to measure the speed of a motor vehicle, indicated that the Appellant's motor vehicle was traveling at a rate of speed of sixty-two (62) miles per hour; the lawful maximum rate of speed in the area within the scope of operation of the radar speed determining device was fifty-five (55) miles per hour.

2. The radar speed-determining device used to measure the rate of speed of the Appellant's automobile was tested on the evening of September 6, 1954, at a time prior to 9:50 p.m., and was found to be working properly.

3. After the State Trooper checked the rate of speed of the Appellant's motor vehicle by use of the radar speed-determining device, the same State Trooper followed the Appellant's motor vehicle for a couple of miles before stopping it to make the arrest. During this time the Trooper did not observe or attempt to observe any violation of the motor vehicle laws by the Appellant.

4. The Appellant, who has a reputation for truth and veracity under oath, testified in the Trial Justice Court of Caroline County on September 17, 1954, that his speedometer was believed to be working properly on the night of September 6, 1954, and testified further that he did not, at any time, while he was operating his motor vehicle in Caroline County, observe a speedometer reading of sixty-two (62) miles per hour, or in excess thereof, and he further testified that he frequently observed the reading of his speedometer on September 6, 1954.

5. The Appellant was convicted in the Trial Justice Court of Caroline County of operating a motor vehicle at an excessive rate of speed, to-wit: sixty-two (62) miles per hour, in a fifty-five (55) mile per hour zone. Said court is not a court of record. The conviction was based entirely upon evidence introduced and accepted under the provisions of Section 46-215.2(a) of the Code of Virginia.

6. The Appellant took an appeal of right to the Circuit Court of Caroline County, Virginia. The matter was heard de novo upon a stipulation of facts by the Appellant and the attorney for the Commonwealth. On the 12th day of May, 1955, the Circuit Court of Caroline County rendered a judgment finding the Appellant guilty of operating a motor vehicle at a speed of sixty-two (62) miles per hour in a

zone where the lawful maximum rate of speed was fifty-five (55) miles per hour, and he was fined ten dollars ($10.00) and costs. See Appendix A. Order of the Circuit Court of Caroline County and Appendix B. Opinion of the Circuit Court of Caroline County.

7. The Appellant applied to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas. On October 7, 1955, the Supreme Court of Appeals of Virginia awarded the Appellant a writ of error and supersedeas.

8. On February 27, 1956, the case was argued before the Supreme Court of Appeals of Virginia. On April 23, 1956, the Supreme Court of Appeals affirmed the judgment of the Circuit Court of Caroline County. See Appendix C. Opinion of Supreme Court of Appeals of Virginia.

9. On September 16, 1956, the Appellant filed a notice of appeal to the Supreme Court of the United States in the Circuit Court of Caroline County, Virginia.

10. On November 12, 1956, the Honorable Leon M. Bazile, Judge of the Circuit Court of Caroline County entered an order at the request of the Appellant "That his time for docketing his appeal be extended for not more than seventy days from this date." See Appendix D.

11. On January 11, 1957, the Honorable Leon M. Bazile, on the motion of the Appellant, entered an order that "The said James Lawrence Dooley shall be granted an extension of time to file a jurisdictional statement before the United States Supreme Court, said extension of time to expire on February 18, 1957." See Appendix E.

12. On February 13, 1957, on motion of the Appellant, the Honorable Leon M. Bazile entered an order that "The

said James Lawrence Dooley shall be granted an extension of time to docket a jurisdictional statement before the United States Supreme Court, said extension of time to expire on March 25, 1957." See Appendix F.

13. On March 25, 1957, on motion of the Appellant, the Honorable Leon M. Bazile entered an order that "The said James Lawrence Dooley shall be granted an extension of time to expire on April 14, 1957." See Appendix G.

14. On April 15, 1957, counsel for the Appellant mailed by first class mail two copies of the jurisdictional statement of the appeal to the Attorney General of Virginia. See Appendix H.

C.

The Questions Presented

1. Has this appeal been timely docketed in conformance with Rule 13 of the Supreme Court of the United States?

2. Is Section 46-215.2(a) (Chapter 313, Acts of Assembly, 1954) repugnant to the Constitution of the United States and the amendments thereto?

II.

ARGUMENT

A.

This Appeal Should Be Dismissed on the Ground That It Was Not Timely Docketed in Conformity With Rule 13

Rule 13 of this Honorable Court provides that it shall be the duty of the Appellant to docket the case and file the record thereof with the clerk of the Supreme Court of the United States not more than sixty days after the filing of the notice of appeal. This Rule provides "But, for good

cause shown, any judge of the court whose decision is being appealed or in which the notice of appeal is filed * * * may enlarge the time for docketing the case. * * * All other applications hereunder must be presented to the judge in question before the expiration of the original sixty-day period."

The Appellant filed his notice of appeal to the Supreme Court of the United States in the Circuit Court of Caroline County on September 16, 1956. Sixty days after September 16, 1956, would be November 15, 1956. On November 12, 1956, before the expiration of the original sixty-day period, upon application by the Appellant, the Honorable Leon M. Bazile, Judge of the Circuit Court of Caroline County, extended the time for docketing the appeal "for not more than seventy days."

After the expiration of the original sixty days specified in Rule 13 the Appellant, at three different times, made application to the Honorable Leon M. Bazile, Judge of the Circuit Court of Caroline County, for extensions of time for docketing the appeal and the Judge granted extensions of time on January 11, 1957, February 13, 1957 and March 25, 1957. These last three applications by the Appellant were made after the original sixty days had expired and, therefore, not in conformity with Rule 13 of this Honorable Court. Under the rules of this Court and the valid order dated November 12, 1956, granting the Appellant seventy additional days within which to docket his appeal, the appeal should have been docketed no later than January 21, 1957. The three subsequent applications of the Appellant and orders granting extensions of time were in contravention with Rule 13 and, therefore, not valid. The Appellant docketed his appeal on April 15, 1957, over eighty (80) days

after the expiration of the time within which it should have been docketed.

The Appellee moves this Honorable Court to dismiss this appeal on the ground that it was not made in compliance with the rules of this Honorable Court, in particular Rule 13.

B.

The Virginia Statute Involved Is Not Repugnant to the Constitution of The United States

The Appellant argues that the following portion of Section 46-215.2 of the Code of Virginia is repugnant to the Constitution of the United States because it allegedly deprives him of due process of law:

> "(a) The speed of any motor vehicle may be checked by the use of radiomicro waves or other electrical device. The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court proceedings where the speed of the motor vehicle is in issue."

This Honorable Court has consistently held that, if a presumption in a criminal statute is reasonable and rebuttable, it does not violate the Fifth and Fourteenth Amendments. *Tot* v. *United States*, 319 U. S. 463; *Yee Hem* v. *United States*, 268 U. S. 178; *Hawes* v. *Georgia*, 258 U. S. 1; *Adams* v. *New York*, 192 U. S. 585.

In every decision on this issue that we have read of this Honorable Court, the decision was based on whether or not there was a natural and rational evidentiary relation between the fact proven and the ultimate fact presumed. *Tot* v. *United States*, 319 U. S. 463; *Morrison* v. *California*, 291 U. S. 82; *Manley* v. *Georgia*, 279 U. S. 1; *Casey* v. *United States*, 276 U. S. 413; *Yee Hem* v. *United States*, 268

U. S. 178; *Hawes* v. *Georgia,* 258 U. S. 1; *Bailey* v. *Alabama,* 219 U. S. 238; *Adams* v. *New York,* 192 U. S. 585.

Is there a rational evidentiary relation between the results of a speed check by radiomicro waves and the speed of the motor vehicle checked? The Appellee feels that unquestionably such a relationship does exist. A recent tabulation indicates that radiomicro devices or electrical timing devices are being used in forty-three states by approximately 500 police departments. See Radar Traffic Controls, 23 Tenn. L. Rev. 784 (1955).

In *State* v. *Dantonio,* 18 N. J. 570, 115 A. 2d. 35, the Supreme Court of New Jersey, in an unanimous opinion, said:

> "Since World War II members of the public have become generally aware of the widespread use of radar methods in detecting the presence of objects and their distance and speed; and while they may not fully understand their intricacies they do not question their general accuracy and effectiveness." (115 A. 2d. 39, 40).

Dean D. W. Woodbridge, in an article in the Virginia Law Review, states:

> "While it is agreed that every reasonable doubt about the accuracy of new developments should promptly be resolved against them in the absence of expert evidence, there is no longer any such doubt concerning radar. Rather, the applicable maxim should now be, 'what the world generally knows a court of justice may be assumed to know.'" Woodbridge, Radar in the Courts, 40 Va. L. R. 809.

In addition to the case of *State* v. *Dantonio, supra,* the accuracy and reliability of radar as a proper instrument for

checking the speed of a moving motor vehicle has been upheld in the following reported cases: *State* v. *Moffitt*, 9 Terry (Del.) 210, 100 A. 2d. 778; *Dietze* v. *State*, 162 Neb. 80, 75 N. W. 2d. 95; *People* v. *Nasella*, 3 Misc. 2d. 418, 155 N. Y. S. 2d. 462; *People* v. *Sachs*, 1 Misc. 2d. 148, 147 N. Y. S. 2d. 801; *People* v. *Sarver*, 205 Misc. 523, 129 N. Y. S. 2d. 8; *People* v. *Katz*, 205 Misc. 522, 129 N. Y. S. 2d. 8; *Dooley* v. *Commonwealth*, 198 Va. 32, 92 S. E. 2d. 348.

The Appellant argues in his jurisdictional statement that there is no possible way of overcoming the evidence of the results of the check of the speed of a motor vehicle by the use of radar. This is not the case. In the instant case had the Appellant made a positive statement that he did not exceed the speed limit, the trial court might have considered this sufficient evidence to repute the prima facie presumption. There are any number of different types of evidence which a court or jury migh consider sufficient to repute the prima facie presumption. There might be a governor on the vehicle regulating its maximum speed; passengers in the vehicle might testify as to its actual speed. A motorist in front or behind the Appellant's vehicle might testify as to the speed of the Appellant's vehicle. If a motorist questions the accuracy of a particular radar unit, upon being stopped by a State Trooper and informed that a radar unit indicated that he was exceeding the lawful rate of speed, he could request that the device be immediately checked for its accuracy in his presence. This prima facie presumption created by Section 46-215.2(a) is not conclusive or irrebuttable. It can be rebutted by creditable evidence within the knowledge and control of the Appellant or any other motorist arrested as a result of the results obtained by the use of a radar device.

III.

CONCLUSION

Wherefore, the Appellee respectfully submits this Statement showing that the questions upon which the decision of this case depends are so unsubstantial as not to need further argument, and the Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the order of the court below.

Respectfully submitted,

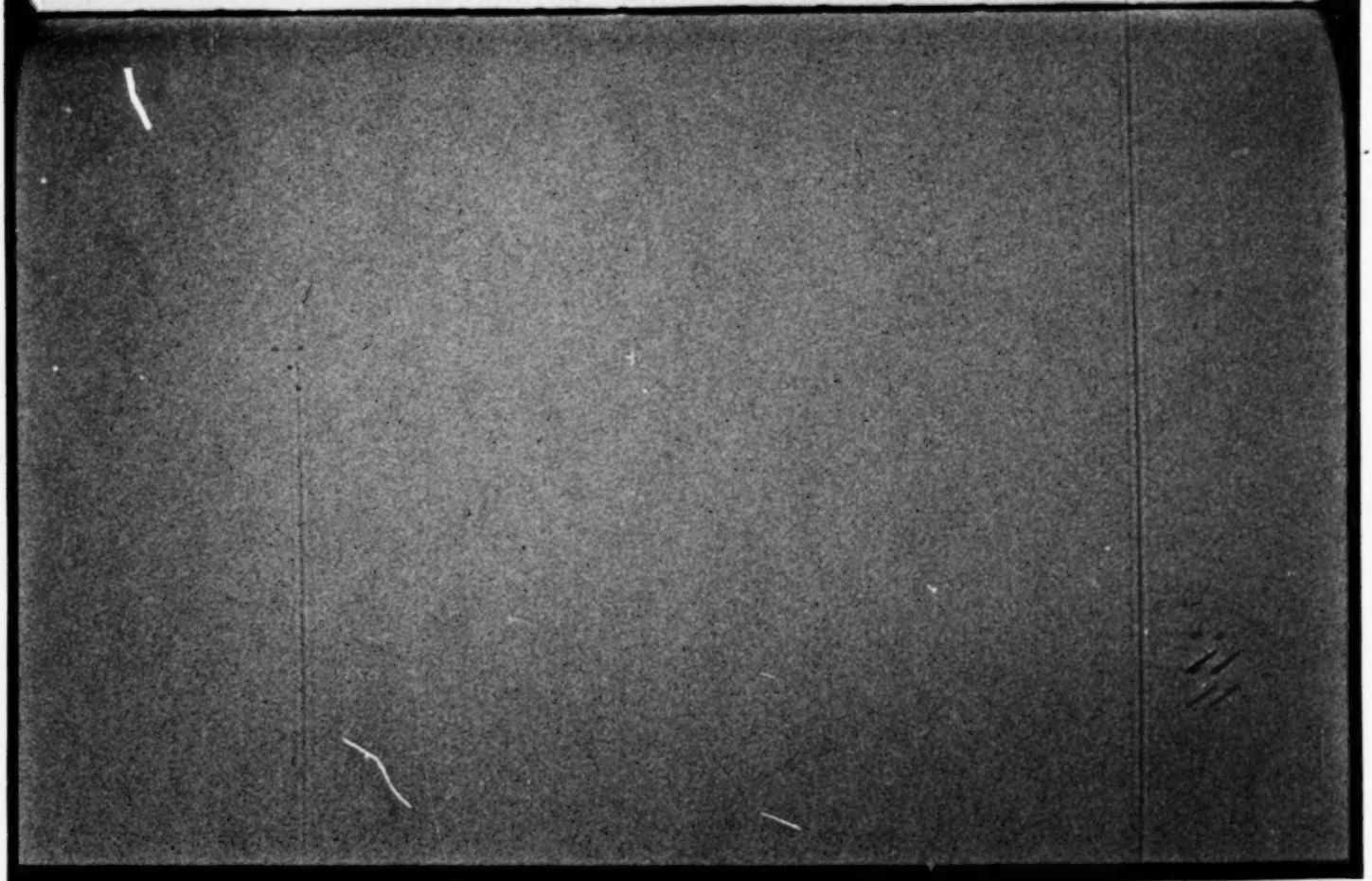
J. LINDSAY ALMOND, JR.
Attorney General of Virginia

C. F. HICKS
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia

May 14, 1957.

APPENDIX



APPENDIX A

ORDER OF THE CIRCUIT COURT OF CAROLINE COUNTY

This day came the Attorney for the Commonwealth and the accused appeared in Court in answer to his recognizance and being represented by counsel, and having pleaded not guilty to the charges in the warrant and waived trial by jury on the 11th day of October, 1954, and the Court on this day after listening to the evidence and the argument of counsel having directed that the Attorney for the Commonwealth and the Attorney for the accused file briefs on the law on the charges in this case within thirty days of the 11th day of October, 1954. Said briefs were filed as directed by the Court and the Court having carefully examined same filed a written opinion in this case. In said opinion the Court held that the accused was guilty as charged in the warrant and that the same fine be imposed that was imposed in the Trial Justice Court. Therefore it is ordered and decreed by this Court that the said James Lawrence Dooley is guilty of operating a motor vehicle at a speed of sixty-two (62) miles per hour in a fifty-five (55) mile per hour zone, on the 6th day of September, 1954 in Caroline County, Virginia and that the said James Lawrence Dooley is fined ten dollars ($10.00) and that he pay the cost in these proceedings.

Enter May 12, 1955.

Leon M. Bazile,
Judge.

APPENDIX B

OPINION OF THE CIRCUIT COURT OF CAROLINE COUNTY

* * *

This is an appeal from the Trial Justice Court which has been submitted to the Court on an agreed statement of facts, which is as follows:

"1. At approximately 9:50 P. M. on Monday September 6, 1954 defendant was operating a motor vehicle on U. S. Highway No. 1 in Caroline County, Virginia; a Virginia State Trooper then and there operated a radar speed-determining device, in the manner normally used to measure the speed of a motor vehicle, and this device, indicated that defendant's motor vehicle was travelling at a rate of speed of 62 miles per hour; the lawful rate of speed in the area within the scope of the radar speed-determining device was, at that time, 55 miles per hour.

"2. The above mentioned radar speed-determining device was tested on the evening of September 6, 1954, prior to the above mentioned operation thereof, and was found to be working properly.

"3. After the above mentioned operation of the radar speed-determining device, the above mentioned State Trooper followed the defendant 'a couple of miles' before stopping him to make the arrest; during this period the State Trooper did not observe or attempt to observe any violation of the speed, or other, laws by the defendant.

"4. U. S. Highway No. 1 is properly provided with radar warning signs and is properly posted with speed limit signs of the type specified in Title 46, Section 215.2 of the Virginia Code.

"5. In the Trial Justice Court of Caroline County on September 17, 1954, defendant testified that his speedometer was believed to be working properly on the night of September 6, 1954; and testified further that he did not at any time in Caroline County on September 6, 1954 observe a speedometer reading of 62 miles per hour or in excess thereof; and testified further that he the defendant frequently observed the reading of his speedometer on September 6, 1954.

"6. Defendant has a reputation for truth and veracity under oath.

"7. Defendant was convicted in the Trial Justice Court of Caroline County on operating motor vehicle at an excess rate of speed, to-wit 62 miles per hour, in a 55 mile per hour zone; said Court is not a court of record; said conviction was based entirely upon evidence introduced and accepted under the provisions of Title 46-215.2 of the Virginia Code."

From the above statement of facts the Court is of the opinion that the defendant did operate his automobile in violation of the law if the result of the radar test is accepted.

It is contended, however, that Code Section 46-215.2 of the Code violates the Fourteenth Amendment to the Constitution of the United States, and, therefore, the result of such test cannot be received in evidence.

The part of the above section under attack here reads as follows: "The speed of any motor vehicle may be checked by the use of radio-micro waves or other electrical device. The results of checks *shall* be accepted as *prima facie* evidence of the speed of such motor vehicle in any court of legal proceedings where the speed of the motor vehicle is at issue." (Italics supplied).

The first section of Amendment XIV to the Constitution of the United States reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Prima facie presumptions have been employed in the Criminal laws of this Commonwealth for many years. The Virginia prohibition laws of 1918 and 1928 contained many sections providing that the establishment of one fact should be *prima facie* evidence of guilt. Thus 4675(20) of the Code of 1926 provided that "all persons found at a distillery where ardent spirits are being manufactured *shall* be deemed *prima facie* guilty of manufacturing the *same* or aiding or abetting in such manufacture * * *"

In *Zimmerman* v. *Commonwealth*, 148 Va. 745, 748, 138 S. E. 569 (1927) the Court said: "Under this section the presence of the accused at the still where the distilled ardent spirits were being manufactured, alone makes out a *prima facie* case of guilt of manufacturing distilled ardent spirits against the accused. *This presumption may be rebutted*, but the question as to whether it has been rebutted is usually one for the jury, especially where there is other incriminating evidence." (Italics supplied).

See also *Johnson* v. *Commonwealth*, 142 Va. 639, 128 S. E. 456 (1925) *Kilgoe* v. *Commonwealth*, 139 Va. 581, 123 S. E. 534 (1924) and *Spencer* v. *Commonwealth*, 136 Va. 687, 689, 116 S. E. 235 (1923).

Even in the absence of a statute it has long been held that the introduction of certain evidence in criminal cases raises a *prima facie* presumption which requires rebuttal evidence by the accused. Thus in *Hanger* v. *U. S.* 285 U. S. 427, 52 S. Ct. 417, 76 L. (ed.) 861 (1932) a prosecution for using the mails to defraud, the Court said (52 S. Ct. 419): "The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed. *Rosenthal* v. *Walker,* 111 U. S. 185, 193, 4 S. Ct. 382, 28 L. (ed.) 395. And the fact that receipt of the letter subjects the person sending it to a penalty does not alter the rule. *Id.*, p. 194 of 111 U. S. 4 S. Ct. 38, 28 L. (ed.) 395. If the indictment had alleged actual delivery of the letter in question the case for the government in this particular would have been made out by proof that the letter thus directed had been placed in the post office for transmission. *The burden then would have been cast upon petitioners to show the contrary."* (Italics supplied).

In *ex parte Converse,* 137 U. S. 624, 632, 34 L. (ed.) 796, 799 (1891) Mr. Chief Justice Fuller speaking for the Court said: "We repeat as has so often been said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the Courts of a State in administering the process provided by the law of the State * * *".

One of the leading cases on this subject is *People* v. *Cannon*, 139 N. Y. 32, 36 A. S. R. 668 (1893). In that case the Legislature of New York enacted a statute which made it unlawful for a junk dealer or dealer in second hand articles to have in his possession certain kinds of trade-marked bottles without the written consent of the owner of the trade mark, and it further provided that such possession should *prima facie* presumed to be in the unlawful use, purchase or traffic in such bottles. The validity of this statute, as is the statute involved here, was assailed as violating the due process clause of the Constitution.

The Court held, however, that the act was not in violation of the Constitution, as notwithstanding the presumption created by the statute the jury should refuse to convict unless satisfied from the whole evidence, beyond a reasonable doubt, that the accused was guilty. It further held that a statute may make the existence of certain facts *prima facie* evidence of the commission of a crime, though the explanation of the facts from which the presumption arises is not peculiarly within the knowledge of the person accused.

In so holding the Court said (36 A. S. R. 679): "The effect of the presumption is to call upon the accused for some explanation. If more be given, the jury may, as I have said, still refuse to convict, but, if they convict, the verdict may be upheld as founded upon sufficient evidence. The provision fills all the requirements of an act of this nature, for it leaves an accused a fair opportunity to relieve himself from the presumption, to explain the circumstances under which the bottles came into his possession, and that they were of such nature as to show him innocent of an unlawful use, purchase or traffic therein."

Of course it is conceded that a statute which created a

conclusive presumption of guilt would be unconstitutional.

But so far as the Court has been able to find it has been a common practice for State laws to declare proof of certain acts or facts *prima facie* evidence of guilt and the cases have uniformly upheld these statutes. See the review of these authorities in *People* v. *Cannon, supra.*

In *Yee Hem* v. *United States,* 268 U. S. 178, 183, 45 S. Ct. 470, 69 L. ed. 904 (1925) the Court quoted from the opinion in *Mobile J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, 43, 55 L. (ed.) 78, 80, 81, 31 S. Ct. 136, 32 L. R. A. (U. S.) 226, Ann Cas. 1912-A 463, 2 N. C. C. A. 243 as follows: "The law of evidence is full of presumptions either of fact or of law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded * * *

"Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous.

* * *

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must under the guise of regulating the

presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

In *Burnett* v. *Commonwealth*, 194 Va. 785, 790, 75 S. E. (2nd) 482 (1953) Mr. Chief Justice Hudgins speaking for the Court said: "The general rule approved by various decisions and legal articles is that the test of constitutionality of such statutes making proof of a certain fact *prima facie* or presumptive evidence of another fact, is whether there is a natural and rational evidentiary relation between the fact proven and the ultimate fact presumed, and that the inference of one fact from proof of another must not be so unreasonable as to be purely arbitrary. To state the rule in positive terms, in order for such a statute to be valid, there must be some rational connection between the fact proved and the ultimate fact to be established."

Speaking of the *prima facie* presumption created by Code Section 18-159 the Chief Justice said: "* * * All the statute does is to create a presumption of a criminal intent from proof of possession of burglarious tools or implements. Such a presumption is not conclusive; it cuts off no defense. It interposes no obstacles to a contest of all the issues of fact, and relieves neither the Court nor the jury of the duty to determine all of the questions of fact from the weight of the whole evidence. 'It is merely a rule of evidence and not the determination of a fact.' *Barton* v. *Camden*, 147 Va. 263, 272, 137 S. E. 465. When possession is proven, the burden of going forward with the evidence shifts to the defendant, but this does not shift, the burden of ultimate proof, or deprive the defendant of his right to have the jury instructed on the presumption of innocence."

It is a well known fact that the excessive use of speed on

the highways has resulted in death to thousands of persons every year and the loss of millions of dollars worth of property. The speed laws of Virginia before the advent of radar were more honored in the breach than the observance by a large percentage of those driving motor vehicles on the highways. The State Police force is entirely too small to adequately police all of the highways of this Commonwealth and even with radar the death toll although somewhat reduced continues to mount.

There is no difference in principle between the catching of speeders with radar and the established system of catching them by trailing them in a car with a properly calibrated speedometer.

All that the statute does is to create a *prima facie* presumption that the speed of a vehicle was that registered by the radar machine. This does not dispense with the necessity for the Commonwealth to prove that the machine was in working order at the time the test was made nor does it dispense with the presumption of innocence or present the accused from interposing any one or more of a number of defenses to rebut this *prima facie* presumption. The presumption here is not conclusive; "it cuts off no defense. It interposes no obstacle to a contest of all the issues of fact, and relieves neither the Court nor the jury of the duty to determine all of the questions of fact from the weight of the whole evidence." *Burnett* v. *Commonwealth, supra.*

For the foregoing reasons it is held that Code Section 46-215.2 (Acts 1954 c. 313) does not violate the Fourteenth Amendment, and is a valid enactment.

The parties having stipulated that the radar device was tested on the evening of 6 September, 1954, prior to its use in measuring the speed of the vehicle operated by the accused,

and was found to be working properly and that it registered the speed of accused's vehicle at 62 miles per hour and the accused having failed to rebut the *prima facie* presumption created by the statute by being unable to testify what his speedometer was registering at the time the radar measured his speed, the accused will be convicted of operating his motor at a speed of 62 miles per hour and the same fine imposed by the trial justice will be imposed.

April 13, 1955.

Leon M. Bazile,
Judge.

APPENDIX C

OPINION OF THE SUPREME COURT OF APPEALS OF VIRGINIA

Dooley was convicted of operating a motor vehicle at a speed of 62 miles per hour in a 55-mile zone. Radar equipment was employed in determining the speed of the car.

Defendant's assignments of error are: (1) That the trial court erred in holding that radar warning signs had been posted in accordance with subsection (c) of §46-215.2 of the Code (1954 Cum. Supp., pp. 83, 84); and (2) That the court erred in holding that §46-215.2 did not violate the Fourteenth Amendment to the Constitution of the United States.

The facts as stipulated in the trial court are contained in the record before us and are substantially as follows:

The defendant was operating a motor vehicle on a primary highway in Carolina County at about 10:00 p.m. on September 6, 1954. A radar speed-determining device oper-

ated by a Virginia State trooper in the manner normally used to measure the speed of a motor vehicle indicated that defendant's automobile was traveling at a speed of 62 miles per hour in a 55-mile-per-hour zone. The radar equipment had been tested on the evening of the arrest and was found to be working properly. After the State trooper had checked the speed of the defendant's car he followed defendant for two miles before making the arrest, during which time he did not attempt to observe any violation of the speed or other laws by defendant.

The highway on which defendant was traveling was properly provided with radar warning signs and speed limit signs of the type specified in §46-215.2 of the Code.

The defendant, who had a good reputation for truth and veracity, testified that his speedometer was believed to be working properly on the night in question. He further testified that he did not, at any time while he was operating his motor vehicle, observe his speedometer reading 62 miles per hour or in excess thereof, and that he had frequently observed its reading at the approximate time in question.

All available evidence is contained in the stipulation, and we are thus limited in the factual consideration of the case.

Subsection (c) of §46-215.2 provides:

"(c) No operator of a motor vehicle may be arrested under this section unless signs have been placed at the State line on the primary highways system * * *."

It will be observed that the stipulation concedes that the highway on which defendant was traveling "was properly provided with radar warning signs * * * of the type specified in §46-215.2 of the Code." Therefore, assignment (1) is without merit.

Defendant contends in assignment (2) that Code, §46-215.2 violates the Fourteenth Amendment to the Constitution of the United States, and that the result of such checks as are provided by statute should not be received in evidence against him. Subsection (a) here under attack provides:

"(a) The speed of any motor vehicle may be checked by the use of radiomicro waves or other electrical device. The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue."

Defendant's contention that the Act contravenes the due process clause of the Constitution is, in our view, without merit. The general rule is that the test of the constitutionality of statutes making proof of a certain fact *prima facie* or presumptive evidence of another fact is whether there is a natural and rational evidentiary relation between the fact proven and the fact presumed. Where such evidentiary relation exists and where the presumption is found to be both reasonable and rebuttable it does not violate the due process amendment. *People* v. *Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759; *Burnette* v. *Commonwealth*, 194 Va. 785, 790, 75 S. E. 2d 482, 485; *Yee Hem* v. *United States*, 268 U. S. 178, 45 S. Ct. 470, 69 L. ed. 904; *Tot* v. *United States*, 319 U. S. 463, 63 S. Ct. 1241, 87 L. ed. 1519. See Annotation, 162 A. L. R., p. 495, *et seq.*

Analagous to many statutory presumptions there are certain rules of evidence carried over from the common law making proof of one fact *prima facie* evidence of another. One such rule is that the exclusive possession of goods recently stolen is *prima facie* evidence of guilt, throwing upon the accused the burden of accounting for that posses-

sion. *Miller* v. *Commonwealth*, 185 Va. 17, 21, 37 S. E. 2d 864, 866. And a mortal wound inflicted with a deadly weapon in the previous possession of the slayer without any or upon slight provocation is *prima facie* evidence of a wilful, deliberate and premeditated killing, and throws upon the accused the necessity of showing extenuating circumstances. Such rules of evidence have been found to be neither unfair nor illogical in a long series of criminal trials. *Thomas* v. *Commonwealth*, 186 Va. 131, 137, 138, 41 S. E. 2d 476, 479; *Bailey* v. *Commonwealth*, 193 Va. 814, 829, 71 S. E. 2d 368, 375, 376.

That there is a natural and rational evidentiary relation existing between the results of a speed check by radiomicro waves and the speed of the motor vehicle checked by them can hardly be denied. For many years the public has become generally aware of the widespread use of radiomicro waves or other electrical devices in detecting the speed of motor vehicles or other moving objects; and while the intricacies of such devices may not be fully understood their general accuracy and effectiveness are not seriously questioned. *State* v. *Dantonio*, 18 N. J. 570, 115 A. 2d 35, 39, 40.

In the instant case the only evidence introduced by the defendant tending to refute excessive speed was the purely negative statement that "* * * he did not at any time * * * observe a speedometer reading of 62 miles per hour * * *." Realizing the probative weakness of this statement defendant contents himself by citing technical data in argument which tends to cast doubt upon the accuracy of radar devices. He recounts many conditions and happenings which allegedly affect the correct reading of radar under given circumstances, and argues that in this light the *prima facie* presumption created by the statute is irrebuttable.

As heretofore stated, the factual consideration of this case is confined to the stipulation. It will be observed that no attempt was made to show that the radar equipment, which had been tested for accuracy just prior to the defendant's arrest, did not properly record the speed. The examples cited by the defendant in his argument in an effort to show that the equipment might have been "thrown off" and may have improperly recorded his speed, show beyond peradventure that if such occurred he could have introduced evidence to rebut the *prima facie* presumption created by the statute.

Neither does the statute, as contended by the defendant, shift the burden of proof. It merely creates a rule of evidence and does not determine the guilt of the accused. When the radiomicro wave check of the speed of a motor vehicle is proved to be in excess of the legal rate of speed the burden of going forward with the evidence shifts to the defendant. This neither shifts the burden of ultimate proof nor does it deprive the defendant of the presumption of innocence. *Barton* v. *Camden,* 147 Va. 263, 272, 273, 137 S. E. 465.

For the reasons stated, we hold that §46-215.2 (Acts of Assembly 1954, Chapter 313, page 385) does not violate the Fourteenth Amendment to the Constitution of the United States, and that it is in all respects a valid enactment.

Affirmed.

APPENDIX D

CAROLINE
COMMONWEALTH v JAMES L DOOLEY

This day came James L Dooley and moved the Court to extend the time for docketing his appeal in this case; and it appearing that his notice of appeal was filed less than sixty days before this date in consideration of which the Court doth grant his request and it is adjudged and ordered that his time for docketing his appeal be extended for not more than seventy days from this date.

Enter

Leon M. Bazile, Judge
12 November 1956.

APPENDIX E

ORDER

James Lawrence Dooley, having moved this Court, which is now possessed of the record of the above styled proceeding, to further extend his time for filing a Jurisdictional Statement in the Supreme Court of the United States, until February 18, 1957, and it appearing that good cause exists for granting such an extension, it is

ORDERED AND ADJUDGED, that the said James Lawrence Dooley shall be granted an extension of time to file a Jurisdictional Statement before the United States Supreme Court, said extension of time to expire on February 18, 1957.

(s) Leon M. Bazile, Judge
Leon M. Bazile, Judge
11 January 1957

APPENDIX F

ORDER

James Lawrence Dooley, having moved this Court, which is now possessed of the record of the above styled proceeding, to further extend his time for filing a Jurisdictional Statement in the Supreme Court of the United States, until March 25, 1957, and it appearing that good cause exists for granting such an extension, it is

ORDERED AND ADJUDGED, that the said James Lawrence Dooley shall be granted an extension of time to docket a Jurisdictional Statement before the United States Supreme Court, said extension of time to expire on March 25, 1957.

(s) Leon M. Bazile, Judge
Leon M. Bazile, Judge
13 February 1957

APPENDIX G

ORDER

James Lawrence Dooley, having moved this Court, which is now possessed of the record of the above styled proceeding, to further extend his time for docketing a Jurisdictional Statement in the Supreme Court of the United States, until April 14, 1957, and it appearing that good cause exists for granting such an extension, it is

ORDERED AND ADJUDGED, that the said James Lawrence Dooley shall be granted an extension of time to expire on April 14, 1957.

(s) Leon M. Bazile, Judge
Leon M. Bazile, Judge
March 25, 1957

A copy teste.
Leon M. Bazile, Judge
25 March 1957.

APPENDIX H

The undersigned, a member of the Bar of this Court, and Counsel of Record in the above-styled appeal, hereby certifies that two copies of the Jurisdictional Statement of the above-styled proceeding were this day mailed, by first class mail prepaid, to the Attorney General of the Commonwealth of Virginia, Supreme Court of Appeals Building, Richmond, Virginia.

(s) G. Galt Bready
G. Galt Bready
126 East Broad Street
Falls Church, Virginia
April 15, 1957

FILED
JUN 5 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

JAMES LAWRENCE DOOLEY, *Appellant,* vs. COMMONWEALTH OF VIRGINIA, *Appellee.*	No. 911

Appeal from the Supreme Court of Appeals of Virginia

APPELLANT'S BRIEF UNDER RULE 16(3)

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

In The

Supreme Court of the United States

October Term, 1956

James Lawrence Dooley, *Appellant,* vs. Commonwealth of Virginia, *Appellee.*	No. 911

Appeal from the Supreme Court of Appeals of Virginia

APPELLANT'S BRIEF UNDER RULE 16(3)

THE MOTION TO DISMISS THIS APPEAL AS UNTIMELY

As the Appellant's procedure, in obtaining extensions of time in which to docket this appeal, was entirely in accord with the accepted practice under Rule 13, it is believed that no argument on this Motion is necessary.

THE MOTION TO DISMISS THIS APPEAL AS FAILING TO PRESENT A SUBTANTIAL QUESTION

As the Appellee does not deny that this appeal presents federal questions which were properly raised below, it cannot be heard to say that this Court lacks

jurisdiction. As it does not suggest that the respective federal questions have already been answered by this Court, the appeal cannot be deemed as lacking substance in the sense of *Zucht* v. *King* 260 U.S. 174 (1922).

The Appellee merely recites its reasons for believing that the instant statutory presumption is constitutional and then concludes that the judgment of court below was so correct as to obviate the need for further argument. While the Appellant does not wish to be drawn into a preliminary argument upon the merits of his case (and will not now discuss his answers to the Questions Presented), he will point out that the Appellee's arguments on the merits of his appeal are illusory in that they avoid taking a stand on the Questions Presented, but rather go only to merits of questions not here in issue.

For example, the Appellee carefully lists every appellate decision wherein some sort of radar evidence was held to be admissible as ordinary evidence, and then suggests that these cases demonstrate such an acceptance of the radar devices involved as to make it *reasonable* to base a presumption of guilt upon their "results".

But this is beside the point. The Appellant is not here challenging the reasonableness of basing a statutory presumption upon the "results" of the radar devices used in those cases. His only attack upon the *reasonableness* of the instant presumption is found in Question Presented No. 3, wherein he inquires as to the propriety of broadly basing a presumption of guilt upon the results of "radiomicro wave and other electrical devices" of any and all kinds—including apparently both devices of proven worth and "Rube Goldberg" devices of questionable dependability.

To summarize, the statute makes the "results" of any of a large number of devices prima facie evidence of the

guilt of the accused. The Appellant questions the propriety of such breadth. The Commonwealth's only reply is to urge that according such weight to the "results" of one, or a few, of these devices is perfectly reasonable. It studiously avoids any discussion of the *reasonableness* of basing the presumption of guilt upon the "results" of the other devices * encompassed by the statute.

Question Presented No. 3 was argued before every court below, and thus is properly before this Court, but the Appellee follows the example of the Virginia courts and merely ignores the existence of this issue and talks about something else.

So also with Question Presented Nos. 1 and 2, which are concerned with the *rebuttableness* of the presumption. Here again the Appellee pretends to argue the merits of its case, but actually begs the issues by devoting its discussion to situations not involved in this appeal.

Now the Appellee may be correct in supposing that certain *atypical* motorists will be able to successfully rebut the presumption when the radar, or other, device makes a mistake. However this appeal is not concerned with the *unusual* individual, described by the Appellee, who equips his automobile with a governor—who sees to it that he is constantly trailed by a friend who carefully notes his speed—who utilizes some extra-sensory perception to detect the presence of the invisible radar beam and then promptly records his exact speedometer reading. There being no reason to assume that the devices used will somehow confine their errors to such improbable individuals, this appeal is concerned only with the rights of the average—the ordinary—motorist who sud-

* In its Brief on Behalf of the Commonwealth, in the Supreme Court of Appeals of Virginia, p. 7, it admitted the distinction between radar devices and the other electrical timing devices used in Virginia.

denly finds himself *presumed guilty* of speeding during the split-second he had passed through a radar beam, or some other electrical detecting means, at a point which may be miles away from the place where he is arrested and first advised of the charges to be lodged against him.

Questions Presented Nos. 1 and 2 are only concerned with the fact that there appears to be no way for the *ordinary* innocent defendant to effectively assume the burden of proving that he was not speeding at that distant time and place. Neither the Appellee nor the courts below have made any practical suggestion as to how *such* an innocent defendant can hope to disprove his guilt.

Conclusion

The Commonwealth argues that a narrow presumption, not here in issue, would be reasonable. It asserts that the presumption here in issue would be rebuttable had it been applied to certain unusual individuals who are not concerned in the instant case. None of these arguments demonstrate a lack of substance in the Questions Presented.

The Questions Presented are admittedly federal. They deal with a statute which materially alters the status of a defendant at the criminal bar. The fact that this statute finds its main application in traffic courts should not dissuade this Court from exercising its jurisdiction; for as recently pointed out by an eminent jurist:

> "It is incontestable that the greatest number of our citizens have their only contact with our judicial system in traffic court appearances. It is there that they obtain and receive lasting impressions as to the method in which justice is carried out. In this

sense, we can all agree it is our most important court." *Macelwane,* The Traffic Court: The Most Important in Our System, 43 American Bar Association Journal, No. 4, p. 322, April, 1957.

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